No. 16340

United States
Court of Appeals
for the Ninth Circuit

STEVE WINN and EDITH WINN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Southern Division.

FILED
MAY - 5 1959
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—4-24-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court for the District of Idaho, Southern Division

No. 3454

UNITED STATES OF AMERICA,

Plaintiff,

vs.

29.27 ACRES OF LAND, More or Less, in the County of Elmore, State of Idaho; STEVE WINN and EDITH WINN, Husband and Wife; O. E. CANNON and ORA F. CANNON, Husband and Wife; ELMORE COUNTY, IDAHO, a Municipal Corporation; ANY AND ALL UNKNOWN OWNERS,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America at the request of the Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States of America, for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the Act of Congress approved August 1, 1888 (25 Stat. 357; 40 U.S.C. 257); the Act of February 26, 1931 (46 Stat. 1421; 40 U.S.C. 258(a) to (e)); and the "Federal-Aid Highway Act of 1956" approved June 29,

1956 (70 Stat. 374), authorizing the acquisition of land or interest in land (including within the term "interests in land" the control of access thereto from adjoining land) required for right of way or other purposes in connection with the prosecution of any project for the construction, reconstruction, or improvement of any section of the National System of Interstate and Defense Highways, funds for such purpose being available from current appropriations for carrying out the provisions of the Federal Highway Act of 1921 (42 Stat. 212) and acts amendatory thereof and supplementary thereto.

3. The public uses for which said land is taken is to adequately provide for the construction, reconstruction, and improvement of Idaho Highway Project I-3022(7), a portion of the National System of Interstate and Defense Highways being constructed in accordance with standards, including control of access, adopted by the Secretary of Commerce in co-operation with the State Highway Departments.

4. The estates taken for said public uses are the fee simple title to Tracts Nos. 5 and 10, subject to existing easements for public roads and highways, together with all existing, future, or potential common law or statutory abutters' rights or easements of access to, from, and between said land and the abutting land of all parties having interest in said land; excepting and reserving, however, to the owner or owners of Tract 10 and to their heirs, successors,

and assigns the right of access to, from and between the right of way of the Mountain Home District East-West Connection Road and their abutting lands north of said right of way between Highway Stations 8/30 and 14/34, as shown generally on the plat of said tract included in Schedule "B" of the Declaration of Taking filed herein; there are also taken for said public uses all existing, future, or potential common law or statutory abutters' rights or easements of access to, from, and between that portion of the right of way of said connection road extending between Highway Stations 19/37 and 21/37 and the abutting northerly lands of all parties having interests in said portion of the right of way.

5. The property so to be taken is described in Schedule "A," hereto attached and made a part hereof.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are as follows:

Names of Purported Owners

Tract 5—Steve Winn and Edith Winn, husband and wife;

Tract 10—O. E. Cannon and Ora F. Cannon, husband and wife.

7. The County of Elmore may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the parties named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff and such persons are made parties to the action under the designation, "Any and All Unknown Owners."

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

BEN PETERSON,
United States Attorney;

By /s/ R. M. WHITTIER,
Assistant U. S. Attorney.

Trial by jury of the issue of just compensation is demanded by plaintiff.

/s/ R. M. WHITTIER,
Assistant U. S. Attorney.

Schedule "A"

Legal Description
(Part to Be Taken)

Project No. I-3022(7), Interstate.

Land Situated in Elmore County, Idaho.

Parcel No. 5

A triangular parcel of land being on both sides of the Highway Survey line as shown on the official plat of U. S. 30—Project No. I-3022(7) Highway Survey on file in the office of the Department of Highways of the State of Idaho and lying over and across the NW¼NW¼ of Section 36, Township 2 South, Range 5 East, Boise Meridian, described as follows, to wit:

Beginning at the Northeast corner of the NW¼NW¼ of Section 36, Township 2 South, Range 5 East, Boise Meridian, which corner is approximately East 1320.0 feet from the Northwest corner of said Section 36; thence South along the East line of the said NW¼NW¼—512.0 feet, more or less, to an intersection with a line parallel with and Southwesterly 200.0 feet from the Highway Survey line of U. S. 30—Project No. I-3022(7); thence North 37° 52′ West along said parallel line, 650.0 feet, more or less, to a point in the North line of the said NW¼NW¼; thence East along said North line, 405.0 feet, more or less, to the Point of Beginning and containing 2.38 acres, more or less.

Highway Station reference: 1845/23 to 1847/65.

Parcel No. 10

An irregular parcel of land, being on both sides of the Highway Survey line as shown on the official plat of U. S. 30—Project No. I-3022(7)—Highway Survey on file in the office of the Department of Highways of the State of Idaho, and lying over and across the SW¼SE¼ and the W½SE¼SE¼ of Section 9, Township 3 South, Range 6 East, Boise Meridian, described as follows, to wit:

Beginning at the Northwest corner of the SW¼SE¼ of Section 9, Township 3 South, Range 6 East, Boise Meridian, which corner is approximately North 1320.0 feet from the South Quarter corner of said Section 9; thence East along the North line of the said SW¼SE¼ 1035.0 feet, more or less, to a point in a line parallel with and Northeasterly 200.0 feet from the Highway Survey line of U. S. 30—Project No. I-3022(7); thence South 76° 09′ 30″ East along said parallel line 978.0 feet, more or less, to the East line of the W½SE¼SE¼ of said Section 9; thence South along the said East line, 412.0 feet, more or less, to a point in a line parallel with and Southwesterly 200.0 feet from said Highway Survey line; thence North 76° 09′ 30″ West, along said last parallel line 1260.0 feet, more or less, to a point at right angles Southwesterly 200.0 feet from said Highway Survey line at Station 2093/79.02 a point on tangent; thence Southwesterly 230.0 feet, more or less, to a point in a line parallel with and 100.0 feet Northeasterly from the center line of the future "Westbound

Connection" to the said Highway Survey, which point bears North 58° 50′ 30″ East from center line Station 26/16.43 of said "Westbound Connection"; thence South 31° 09′ 30″ East, along said last parallel line, 950.0 feet, more or less, to the South line of the said SW¼SE¼; thence West along the said South line 815.0 feet, more or less, to a point in the South line of said Section 9, which point is in the Northeasterly right of way line of present U. S. Highway 30; thence Northwesterly 308.4 feet along a 5779.58 foot radius curve left, said curve having a central angle of 3° 04′ to a point in the West line of the SW¼SE¼ of said Section 9, which point is North 108.0 feet from the South Quarter corner of said Section 9 and which point bears Northeasterly and radially 50.0 feet from approximate center line Station 8/30, a point on curve of an "East and West" Connection Road; thence Easterly parallel with and Northerly 50.0 feet from said last center line along a 1382.33 foot radius curve left, 400.0 feet, more or less, to a point opposite Station 12/45.92 of said "Connection Road," a point of tangent; thence continuing along said parallel line, South 89° 31′ 30″ East 390.0 feet, more or less, to the point of intersection with a line parallel with and Southwesterly 150.0 feet from the center line of the "Eastbound Connection" to the said Highway Survey, said last point of intersection being approximately opposite Station 16/34 of the said "East and West" Connection; thence, along said last parallel line Northwesterly as follows: North 31° 09′ 30″ West, 21.0

feet, more or less, to a point opposite Station 2099/78.67; thence along a spiral curve left, said curve having a central angle of 2° 30′ to a point opposite Station 2097/28.67; thence along a 2714.79 foot radius curve left 930.0 feet, more or less, to the West line of the said SW¼SE¼; thence, North along the said west line 383.0 feet, more or less, to the Point of Beginning.

Highway Station reference: 2086/30 to 2101/51.1 (Eastbound Connection) and 2087/50 to 2105/88 (Future Extension).

The above description encompasses approximately 26.89 acres of which approximately .64 acres is acknowledged to be a portion of public road.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing ex parte upon motion of plaintiff for an order for the surrender of possession of the property described in the complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It is, this 13th day of June, 1958, adjudged that all defendants to this action and all persons in the

possession or control of the property described in the complaint filed herein shall surrender possession of the said property, to the extent of the estate being condemned, to plaintiff on or before 12:00 o'clock noon on the 30th day of June, 1958, provided that a copy of this order shall be served upon all persons in possession or control of the said property on or before July 30, 1958.

Dated this 13th day of June, 1958.

/s/ CHASE A. CLARK,
Judge, U. S. District Court.

[Endorsed]: Filed June 13, 1958.

[Title of District Court and Cause.]

JUDGMENT ON DECLARATION OF TAKING

This Cause coming on to be heard at this term of court upon the motion of plaintiff, United States of America, to enter a judgment on the Declaration of Taking filed in the above-entitled cause on June 13th, 1958, and for an order fixing the date when possession of the estate or interest upon the property herein described is to be surrendered to the United States of America, and upon consideration thereof and of the Complaint filed herein, said Declaration of Taking, the statutes in such cases made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said Complaint;

Second: That a complaint in condemnation was filed at the request of the Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States of America, the authority empowered by law to acquire said estate or interest upon the lands described in said complaint and also under authority of the Attorney General of the United States;

Third: That the Complaint and Declaration of Taking state the authority under which, and the public use for which the estate of interests upon said lands were taken, that the Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States of America, is the person duly authorized and empowered by law to acquire lands such as are described in the Complaint for the purpose of adequately providing for the construction, reconstruction, and improvement of Idaho Highway Project I-3022(7), and that the Attorney General of the United States is the person authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the land upon which said estate or interest is sought to be

taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fifth: That said Declaration of Taking contains a statement of the estate or interest in the said lands taken for said public use;

Sixth: That a plat showing the lands taken is incorporated in said Declaration of Taking;

Seventh: That a statement is contained in said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for said estate or interest, in the amount of $2,275.00, and that said sum was deposited in the registry of this court for the use of the parties entitled thereto upon and at the time of the filing of the said Declaration of Taking.

Eighth: That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation for the taking of said estate or interest, in the opinion of the said Federal Highway Administrator, acting pursuant to delegation of authority from the Secretary of Commerce of the United States, will be within any limits prescribed by law on the price to be paid therefor; it is, therefore, this 13th day of June, 1958,

Ordered, Adjudged and Decreed that the estate or interest in the lands described in Schedule "A," attached hereto and made a part hereof, vested in the United States of America upon the filing of said Declaration of Taking and the depositing in

the Registry of this court of the said sum of $2,275.00, as hereinabove recited, the said estate or interest in the said lands are deemed to have been condemned and taken for the use of the United States of America and the right to just compensation for the estate or interest in the property taken, upon the filing of the Declaration of Taking and making of the deposit, vested in the persons entitled thereto, and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

That the United States was entitled to the possession of the estate or interest upon the lands above described at 12:00 o'clock noon on the 30th day of June, 1958, and within 30 days hereafter, a certified copy of this judgment shall be served upon the defendants in possession of said premises, or if no defendants are in actual possession of said premises, then within 30 days hereafter, a certified copy of this judgment shall be posted in a conspicuous place upon the premises, the United States and its agents are hereby authorized to enter upon said premises and take full and complete possession of said estate, and this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises; and

It Is Further Ordered that the United States Marshal be and he is hereby directed and instructed forthwith to serve a certified copy of this judgment upon any of the defendants now in possession

of the above-described premises, or if no such defendants are found in actual possession of said premises, then he is ordered to post such certified copy at a conspicuous place upon said premises and forthwith make due return of said service to this Court.

Dated this 13th day of June, 1958.

/s/ CHASE A. CLARK,
Judge, U. S. District Court.

[Schedule A attached to the foregoing is identical to Schedule A attached to the Complaint. See pages 7 to 10 of this printed record.]

No. 3454-S., Civil

Judge Clark

September 9, 1958

UNITED STATES OF AMERICA,

vs.

STEVE WINN, et al.

Comes now Perce Hall, counsel for the defendants, and moved the Court to withdraw defendant's demurrer.

Good cause appearing and the Court being fully advised, the demurrer was ordered withdrawn.

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED INSTRUCTION

Defendants submit herewith their requested jury instructions.

CLEMENS, SKILES & GREEN,
JEPPESEN & JEPPESEN,

By /s/ KARL JEPPESEN.

Instruction No. 1

The measure of damages to be awarded to the defendants Steve Winn and Edith Winn in this case is the difference in market value of their property before the taking of any of it by the State as compared to its market value after the contemplated new highway is built.

Instruction No. 2

The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property, known in law as a right of access and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

Instruction No. 3

You are instructed that all loss or damage to the defendants occurring by the taking must be as-

sessed or determined in one proceeding. The damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of the defendant's property and from the use to which the State proposes to put the property taken.

Instruction No. 4

In determining market value of the defendant's property as of the date of the issuance of Summons in this case, and in determining market value of the property remaining after the taking, you must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the State has been taken and put to the use proposed by the plaintiff, and you should determine the difference between the value before the taking and after the taking, and your judgment should be for the defendant in the amount of that difference.

Instruction No. 5

In determining the value of defendant's property after the taking of a part of it by the State, you may consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have on the market value of the defendant's remaining property.

[Endorsed]: Filed September 25, 1958.

No. 3454-S, Civil

UNITED STATES OF AMERICA,

vs.

29.27 ACRES OF LAND, et al., (Tract No. 5).

September 24, 1958

Judge Clark

This cause came on for trial before the Court and a jury, R. M. Whittier, Assistant United States Attorney, appearing for the United States.

On motion of Dale Clemons, it was ordered that Dale Clemons and Karl Jeppesen be entered as counsel for the defendants, Steve and Edith Winn.

It was further ordered that the motion to intervene by Orville O. Mabe and Edna Mabe be denied without prejudice.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mrs. Margaret Watkins, D. G. Mitchell and Mrs. Pearl Bartholomew, whose names were so drawn, were excused for cause; C. H. Button, whose name was also drawn, was excused on the defendant's peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly

qualified and who were accepted by the parties to complete the panel of the jury, to wit:

1. Andrew Mickelson.
2. Leona W. Hann.
3. Mrs. Wilma Corn.
4. Edward C. French.
5. Vern Underdahl.
6. Earl Owen.
7. Etta Foss.
8. Harold Shertzer.
9. Ira Foster.
10. Mary Stamper.
11. Virginia Hanson.
12. Mrs. Chester L. Mink.

The Court directed that two jurors, in addition to the panel, be called to sit as alternate jurors. Thereupon, the names of George H. Bowen and John George were drawn from the jury box, and on being sworn and examined on voir dire, were found duly qualified and were accepted by counsel for the respective parties.

The jury panel and the alternate jurors were sworn to well and truly try the cause at issue and a true verdict render.

Upon agreement of counsel for the respective parties and the Court being advised, it was ordered that the jurors, in company and in charge of the Marshal and Bailiffs, proceed to the property involved in this action to view the premises, and that the jurors refrain from talking among therselves

or with anyone on any subject connected with the trial of this cause. It was further ordered that the United States Marshal furnish the jury with transportation for the purpose of viewing the property.

Thereupon, the jurors were placed in charge of the U. S. Marshal and Bailiffs, duly sworn, to proceed to view the premises. The Court thereupon recessed this cause until 2 o'clock p.m., Wednesday, September 24, 1958.

The Marshal was directed to provide the jury with dinner at the expense of the United States.

After a statement of plaintiff's cause by its counsel, Richard Maule, Vernon C. Turner and Coite E. Cloninger were sworn and testified as witnesses and other evidence was introduced on the part of the United States, and here the plaintiff rests.

After admonishing the jury, the Court excused them to 10 o'clock a.m., Thursday, September 25, 1958, and further trial of the cause was continued to that time.

No. 3454-S, Civil

[Title of Cause.]

September 25, 1958

Judge Clark

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate jurors were all present.

Emmett Newell and Steve Winn were sworn and testified as witnesses on the part of the defendant, and here the defendant rests.

The cause was argued before the jury by counsel for the respective parties, after which the Court instructed the jury.

The Court discharged the alternate jurors and the jury panel retired in charge of bailiffs, duly sworn, to consider their verdict.

On the same day the jury returned into court, whereupon, the jury presented their written verdict, which was in the words following:
[Title of Court and Cause.]

We, the Jury, find the fair market value of certain property described in the Complaint as Tract No. 5 as of June 13, 1958, the date of taking, to be the sum of $100.00.

September 25, 1958.

IRA FOSTER,
Foreman.

The verdict was recorded in the presence of the jury and then read to them and they each confirmed the same.

United States District Court for the District of Idaho, Southern Division

No. 3454

UNITED STATES OF AMERICA,

Plaintiff,

vs.

29.27 ACRES OF LAND, More or Less, in the County of Elmore, State of Idaho; et al.,

Defendants.

JUDGMENT
(Tract No. 5)

This Cause, in respect to Tract No. 5, for a more particular description of which reference is hereby made to the Declaration of Taking filed herein, came on regularly to be heard before Honorable Chase A. Clark, presiding Judge, and it appearing to the satisfaction of the Court from the records and files herein,

I.

That on June 13, 1958, a Complaint, together with a Declaration of Taking, was filed herein; and there was deposited in the registry of the court the sum of $100.00 as estimated compensation for the estate taken in Tract No. 5.

II.

That the estate taken is a fee simple title as defined in the Complaint and Declaration of Taking.

III.

That the Secretary of Commerce, at the request of the State of Idaho, has found and determined that it is necessary and advantageous to acquire Tract No. 5 in connection with the construction, reconstruction, and improvement of Idaho Highway Project I-3022(7), a portion of the national system of interstate and defense highways.

IV.

That, at the time of the filing of the Declaration of Taking fee simple title to Tract No. 5 was vested in Steve Winn and Edith Winn, husband and wife; that they are the only parties entitled to recover for the taking of said property except Elmore County, Idaho, which has a lien for general taxes.

V.

That a jury of twelve members was duly empanelled, viewed the land, heard all testimony relating to the issue of just compensation for the taking of Tract No. 5 as of the date the Declaration of Taking was filed herein on June 13, 1958, and returned its verdict on September 25, 1958, in the sum of $100.00; that there was deposited by the plaintiff with the Clerk of the above Court the sum of $100.00.

Now, Therefore, by reason of the law and the premises, It Is Ordered, Adjudged and Decreed:

VI.

That the use for which the lands or interests

therein were taken is a public use and that the taking by eminent domain is duly authorized by the Acts of Congress set forth in the Complaint filed herein.

VII.

That the fee simple title in and to Tract No. 5 vested in the United States of America upon the filing of a Declaration of Taking on June 13, 1958, free and clear of all liens or encumbrances.

VIII.

That as of June 13, 1958, the date of the Declaration of Taking was filed herein, the just compensation, including all damages sustained by reason of the taking of the property rights hereinabove described, is the sum of $100.00.

IX.

That the clerk of this court be and he is hereby authorized, empowered and directed to pay to Steve Winn and Edith Winn, husband and wife, and Elmore County, Idaho, the sum of $100.00 now on deposit in the registry of this court.

Jurisdiction is retained for such further orders as may be necessary and proper.

Dated this 29th day of September, 1958.

/s/ CHASE A. CLARK,
Judge, United States District Court.

[Endorsed]: Filed September 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Steve Winn and Edith Winn, husband and wife, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on September 29, 1958.

CLEMONS, SKILES & GREEN,

By /s/ DALE CLEMONS.

JEPPESEN & JEPPESEN,

By /s/ KARL JEPPESEN.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 27, 1958.

In the United States District Court for the District of Idaho, Southern Division

No. 3454

UNITED STATES OF AMERICA,

Plaintiff,

vs.

29.27 ACRES OF LAND, More or Less, in the County of Elmore, State of Idaho, STEVE WINN and EDITH WINN, Husband and Wife, et al.,

Defendants.

TRANSCRIPT

This matter was tried before the Honorable Chase A. Clark, Chief Judge, United States Dis-

trict Court, sitting with a jury, at Boise, Idaho, on September 24, 1958.

Appearances:

BEN PETERSON, ESQ.,
United States Attorney;
R. M. WHITTIER, ESQ.,
Assistant United States Attorney,
Boise, Idaho,
Attorneys for Plaintiff.

KARL JEPPESEN, ESQ.,
Boise, Idaho;
DALE CLEMONS, ESQ.,
Boise, Idaho,
Attorneys for Defendants.

September 24, 1958—10 A.M.

RICHARD A. MAULE

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whittier:

Q. Will you state your full name please?

A. Richard Albert Maule.

Q. Will you spell your last name for the Reporter? A. M-a-u-l-e.

Q. Where do you reside?

A. Just outside of Boise, Idaho.

Q. What is your profession?

(Testimony of Richard A. Maule.)

A. Civil Engineer.

Q. Who are you employed by?

A. The Idaho Department of Highways.

Q. Is that at Boise, Idaho?

A. The headquarters is, yes, sir, and I am employed just outside of Boise.

Q. How long have you been so employed?

A. Approximately two years.

Q. Do you have any professional degrees?

A. Yes, sir, I do.

Q. What degrees do you have? [3*]

A. Bachelor in Business Administration and Bachelor of Science in Civil Engineering.

Q. Have you had any experience as an engineer?

A. Yes, sir.

Mr. Jeppesen: We will admit his qualifications as an Engineer.

Q. Handing you what has been marked for identification purposes as Plaintiff's Exhibit 1 I will ask you to state what that is?

A. That is a strip map of this Cleft Sebree project.

Q. Would you identify that—Cleft Sebree?

A. I believe Cleft is the name of the railroad station or water tower or something of the sort in what we would call the beginning of this project. We station usually from east to west, and Sebree, I believe, is another point on the railroad further toward Mountain Home. The job extends a little further than that—what I am getting at is that the

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(Testimony of Richard A. Maule.)

highway more or less parallels the railroad and that is probably the reason for that identification.

Q. Will you identify this insofar as its location from Mountain Home, Idaho, is concerned?

A. The entire job? [4]

Q. Yes.

A. It would be about three miles from the Sebree end of the job.

Q. To Mountain Home?

A. Approximately, yes.

Q. Mountain Home would be what direction from the Job? A. It would be southeast.

Q. Is there located on the exhibit a tract of land owned by the Defendant Steve Winn and his wife? A. Yes, there is.

Q. How is that noted on there?

A. How is it noted?

Q. Yes.

A. It is in color, the bounds of it are in color, drawn in pencil and it says "entire tract containing parcel number 5."

Q. Is there noted thereon the proposed location of the highway together with the intersections on this proposed highway as they are planned by the Highway Department? A. Yes, there is.

Q. Are they labeled thereon?

A. Yes, that's correct. [5]

Q. Is there shown thereon the location of the highway as it now exists? A. Yes.

Q. Over this area? A. Yes.

Q. And there is shown also the proposed new highway, is that correct?

(Testimony of Richard A. Maule.)

A. That is correct.

Mr. Jeppesen: I wonder if I could see the map.

Mr. Whittier: I am about to move for the admission of the exhibit.

The Court: Yes, it may be admitted and it will be placed on the board.

Q. Would you show on the map where the Winn property is located?

A. These four straight lines.

Q. Are you familiar with the land to be taken on this Winn property? A. Yes, sir.

Q. And what amount of this property is to be taken? A. 2.30 acres.

Q. For the purposes of the record would you note thereon [6] which property is to be taken?

A. That is a little hard to tell on this scale but a little triangular part of this property comes up into the Interstate proposed right of way.

Q. Will you mark that with an X?

A. Yes.

Q. At that point could you tell the jury what the design of the proposed highway will be?

A. The proposed highway is to carry a total of four lanes, two lanes east bound and two lanes west bound, they are to be separate roadways. The center lines are a hundred feet apart. The center line of the east bound is fifty feet on one side of the main center line—a theoretical center line, and the center line of the west bound is fifty feet on the other side. To my recollection approximately, oh, between 90 and a hundred and some feet, I think 120 feet on

(Testimony of Richard A. Maule.)

this side (indicating) and the same amount on the other side is required to be taken. It is no different, I would say, than any other highway except that it is a pair of highways, a pair of highways adjacent to each other.

Q. And the corner that is taken of the Winn property is an entire corner, there is no division of one part of his property from another? [7]

A. No, sir.

Mr. Whittier: I think that's all, you may examine.

Cross-Examination

By Mr. Jeppesen:

Q. Mr. Maule, what is there—how much frontage of the new highway is on the Winn property?

A. How much is exposed?

Q. What frontage does he have on the new highway? A. 650 feet.

Q. 650 feet of the Winn property is exposed to the new highway?

A. That's correct, exposed to the new highway.

Q. Will there be access to the new highway from that 650 feet? A. No.

Q. Why not?

A. My understanding was that the highway would be designed with no access at any point except as indicated in a brochure——

Q. Do you mean it would be impossible for any person, including this defendant here to enter the

(Testimony of Richard A. Maule.)

highway at any point along these strips shown there?

A. The way the highway is presently designed, this section of the Interstate, it would be impossible to enter any portion of the Interstate Highway between these [8] two points (indicating) in this vicinity.

Q. Will that be fenced? A. Yes, sir.

Q. Where is the nearest point that Mr. Winn could get on the highway from his present location?

A. I believe that it would be approximately 4.8 miles from his property to this Sebree Connection and that would be the nearest point.

Q. He would have to travel 4.8 miles to get on this road? A. That is approximate.

Q. Now, on the direction toward Boise how far would he have to go to get on that same road?

A. I am not too familiar with this, off the Interstate, however he would have to travel about 2.3 miles to this underpass, this is the structure that is lying off here (indicating), over the Interstate but will not give them access to it, and it would be, by scale, approximately when this present job is completed it would be approximately a little over eight miles to the crossing over here and in the vicinity of a little over fourteen around this way if you follow this road parallel with the railroad track——

Q. You said eight or fourteen?

A. This route up here would be approximately a little over fourteen.

Q. That is, he would have to travel fourteen

(Testimony of Richard A. Maule.)

miles toward Boise if he wanted to get on the new road, from his place?

A. That is if he stayed on this side of the Interstate. He could cross over this underpass but he couldn't get on the Interstate at that point—it would be approximately eight miles.

Q. Would it be eight miles if he went on the underpass to a point where he could get on the freeway?

A. This would be the closest point he could get on the Freeway. I presume he could find a road across the desert.

Q. In other words, it is eight miles to that underpass?

A. It is approximately 2.3 miles from this point here (indicating) to the underpass and then it is about six miles up this road and over to highway 30 on the nearest road that could be considered a road of any reasonable use.

Q. This is about eight miles that people who wanted to visit him would have to go to get on a traveled road toward Boise, and the other way they would have to go 4.8 miles to get to his place?

A. That's correct. [10]

Q. Now, what happens to Highway 30 as it now stands on the west of Mr. Winn's Property?

A. Highway 30 is planned to be continued along to this point (indicating) and slightly beyond, it intersects this road here you see which runs to the railroad track in the direction of Boise, and comes

(Testimony of Richard A. Maule.)

down this way. From this point back this way it is planned to obliterate the road.

Q. You will tear up the culverts?

A. That's correct, to the best of my knowledge the road will not be usable.

Q. And at the point where the Interstate intersects the road extending to the south is that a paved improved road?

A. This road here (indicating)?

Q. Yes.

A. I don't know the condition of that road.

Q. Is it not just a dirt road that takes off across the desert?

A. I am not certain as to the condition of that—I believe it's usable.

Q. As a matter of fact highway thirty as it is at the present time—the present Highway 30 will no longer be useable for travel to and from Mr. Winn's property, after [11] this new route is built?

A. That is correct. I understand there would be no road from this point by way of present highway thirty, as such.

Q. On the other end, in here—it will be open for approximately 4.8 miles and then it goes, I suppose, in a clover leaf?

A. It is proposed to ultimately place a clover leaf here, however, it will connect or rather intersect a connection coming off the Interstate and coming back on to highway thirty, that would leave an access at that point (indicating).

Q. Is there any consideration given in the pres-

(Testimony of Richard A. Maule.)

ent plans to supplying a paved or improved road to Mr. Winn's present place?

Mr. Whittier: You mean any other location in addition to this?

Q. Yes, any other means of getting to his place except what you have told me here?

A. No other.

Q. Is the proposed route a part of the same highway system as highway thirty now is—is it still considered a part of Highway 30?

A. I couldn't answer that. [12]

Q. It does use stretches of Highway 30 and then departs from it?

A. Physically speaking, yes.

Mr. Jeppesen: I think that's all.

Redirect Examination

By Mr. Whittier:

Q. Mr. Maule, in so far as the road through or to this property is concerned is it changed at all?

A. Physically.

Q. As the road now exists through the property?

A. I don't know the answer to that, as it now exists.

Q. Would the location be changed?

A. No.

Q. Would the access be controlled in any way off Highway 30 to the Winn property as it now exists?

A. To the best of my knowledge it would remain the same.

(Testimony of Richard A. Maule.)

Q. There is no plan to deprive Mr. Winn of the use of highway thirty to his property, as it now exists? A. No—that is correct.

Q. And it is a hard surfaced highway at that point? A. Yes, that is correct.

Mr. Whittier: That is all.

Recross Examination

By Mr. Jeppesen. [13]

Q. Isn't it true that, as you said, you were planning on tearing up the highway, obliterating it from this point (indicating) approximately eight miles from his property?

A. In answer to Mr. Whittier's question I said we didn't plan—his question was that we didn't plan to change the highway through the property, and my answer was no—however, this point down here on through to where it intersects the Interstate is to be obliterated.

Q. All you were referring to in answer to Mr. Whittier was the stretch within the confines of Mr. Winn's property?

A. That's correct, we won't touch that.

Q. But his access on highway 30 is materially changed?

Mr. Whittier: I object to that as repetition.

The Court: Well, if he has answered it he can answer it again.

A. Would you repeat that question?

Mr. Jeppesen: Will you read it Mr. Vaughan?

(Testimony of Richard A. Maule.)

(Question read by Reporter.)

Q. Let me put it this way: In other words, Mr. Maule, at the present time people traveling to and from Mr. [14] Winn's property can go directly from Boise and in to Boise on an improved highway?

A. Yes, that's right.

Q. And that will not be so when the new highway is built, is that right?

A. Directly into Boise on an improved highway, that is correct, they will not be able to do that.

Mr. Jeppesen: That is all.

Mr. Whittier: That's all, and now, your Honor, I have here Plaintiff's proposed Exhibit 2 which is an exemplified copy of a letter from G. Bryce Bennett, addressed to the Highway Administrator, Department of Commerce, wherein the State of Idaho requests the Federal Government to condemn this property and we move its admission. Mr. Bennett is the Highway Engineer.

The Court: It may be admitted.

VERNON C. TURNER

called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Whittier:

Q. State your name please. [15]

A. Vernon C. Turner.

(Testimony of Vernon C. Turner.)

Q. What is your profession sir?

A. Fee Appraiser.

Q. Where do you reside?

A. I reside here in Boise.

Q. How long have you been acting as an appraiser?

A. I have been active as a full time appraiser for approximately five years, and prior to that on a part-time basis.

Q. Have you had any special training in regard to making appraisals?

A. I have had appraisal course one, sponsored by the American Institute of Real Estate Appraisers at Stanford University and Appraisal Courts two by the same sponsor at the University of Oregon and three special condemnation conferences held in Tacoma, Vancouver and Portland, Oregon, within the past four years.

Q. During the time you have been doing this appraising what types of property have you appraised?

A. Well, I appraise all types of property. However, I specialize in condemnation matters and single family and multi-family residential properties.

Q. Have you appraised farm areas and grazing areas? A. Yes.

Q. Mr. Turner, have you been employed by the State of Idaho [16] Department of Highways to appraise certain property belonging to Steve Winn and his wife? A. Yes, sir.

(Testimony of Vernon C. Turner.)

Q. Did you make the appraisal?

A. Yes, I did.

Q. Have you any interest in the property directly or indirectly or do you contemplate any interest in the property in the future?

A. None whatsoever.

Q. Are you related to any of the parties interested in this suit? A. No, sir.

Q. Mr. Turner, in making your appraisals you have been asked to determine at times the market values, have you not? A. Yes.

Q. Define, as an expert appraiser, what your definition of market value is?

A. Market value is that price measured in terms of money which a willing buyer not compelled to buy and a willing seller, not compelled to sell can agree upon, both being fully aware of its capabilities and adaptabilities.

Q. Now, while you were making your appraisal of the Winn property did you take certain photographs of this area? [17]

A. Yes. I might add on those photographs that they were taken in conjunction with Mr. Peterson, another appraiser.

Q. Handing you what has been marked for identification as proposed Exhibit 3 will you state what it is? A. Pardon?

Q. Will you state what proposed Exhibit 3 is?

A. One photo is a print of station 1846 looking south toward the Rock Shop, that is the improvements on subject property and the Crater Station.

(Testimony of Vernon C. Turner.)

The second photo is a closeup of the rock shop looking west and the third photo——

Q. That is Exhibit 4?

A. Exhibit 4, yes. This shot was taken between the Rock Shop and the Crater Station both being the improvements on subject property at station number 1846 which is directly under the point of the arrow in this particular photo, and print number four and exhibit 4 is taken from the North side of Highway 30 looking south toward the Crater Station with the Rock Shop on the left, seen under the same arrow indicating sign.

Mr. Whittier: We move for the admission of Exhibits 3 and 4.

Mr. Clemons: We have no objection. [18]

The Court: They may be admitted.

Q. Now, you say that you have visited this land belonging to Mr. and Mrs. Winn, have you not?

A. Yes, I visited this while making this appraisal various times during the fifteen day period prior to December 12, 1957.

Q. You have examined the type of land and the nature and character of the land have you not?

A. Yes.

Q. What is your determination—have you made a determination as to the highest and best use to which this land can be put, that the Government seeks to condemn?

A. It was my opinion that the highest and best use of the subject property was as it is now being

(Testimony of Vernon C. Turner.)

utilized, namely dry land grazing, possibly held for speculative purposes due to the Mountain Home Irrigation District.

Q. During the time you made the appraisal did you have an opportunity to check like sales of comparable property in that area?

A. Yes, sir.

Q. What did you find in checking that—how many did you find?

A. I found six recent sales of similar properties and two current listings for sale of similar properties. [19]

Q. Having in mind the definition of fair market value as the amount of cash or its equivalent that a person willing to buy but not required to, would pay, and a person willing to sell but not required to, would accept, considering the highest and best use to which this tract could have been put on the date of the filing of this action which I believe was June 13, 1958, or within a reasonable time after that. Do you have an opinion as to the reasonable market value of this tract?

A. The "before" market value?

Q. Yes, before? A. $3,150.00.

Q. Of the tract that was taken?

A. Oh, of the tract that was taken—$100.00.

Q. Now, you stated Three thousand some dollars, what particular tract did that refer to? You may step to the map if you desire?

A. It refers to all this land (indicating) with the exception of thirteen or fourteen acres right

(Testimony of Vernon C. Turner.)

here (indicating) where the improvements are now located.

Q. That would be everything north of the present highway—of the Winn property north of the highway? A. Yes, sir. [20]

Q. And that was the value before the taking or after taking?

A. $3,150.00 was the value before taking.

Q. And what was the value of that particular tract after taking? A. $3,050.00.

Q. Making the total amount of damages amount to what?

A. The difference in the value or the just compensation of $100.00.

Q. You determined the value of this land on an acreage basis did you? A. Yes.

Q. What did you determine the value to be per acre?

A. From similar sales and listing, a valuation of fifty dollars per acre.

Q. On this tract north of the present highway 30 is there any improvements located on this land at all? A. No improvements, no.

Q. It is all land which would be suitable only for grazing?

A. For dry land grazing purposes, yes.

Mr. Whittier: That is all Mr. Turner.

(Testimony of Vernon C. Turner.)

Cross-Examination

By Mr. Jeppesen:

Q. Mr. Turner, isn't it true that north of the present highway some of the signs that you show on exhibits are located?

A. I believe that the arrow sign is located north of the [21] present highway, yes.

Q. Then did I understand that your value of $3,150.00 was for all land both north and south of the present highway except where the improvements are?

A. Well, the previous testimony I gave was the lands north of the present highway but on looking at my sketch there is approximately twenty acres located between the present highway and the Union Pacific Railroad right of way which the $3,150.00 would include, both the land located between the present highway and the railroad and those lands located north of the present highway.

Q. You are treating that tract of Mr. Winn's as a unit both north of that highway and south of the highway?

A. With the exception of the fourteen acres where the improvements are now located.

Q. Now, with reference to the improvements as they are shown on your exhibit and as you saw them out there, what is your opinion as to the value of the improvements on that fourteen acres as of June 13, 1958?

(Testimony of Vernon C. Turner.)

A. Will you state that again please?

Mr. Whittier: I will object to that as being immaterial.

Mr. Jeppesen: I will withdraw that. [22]

Q. Did you make an appraisal of what you refer to as the Rock Shop and the other buildings used in connection with it?

Mr. Whittier: We object to that as immaterial, it is not the same tract.

The Court: As I understand the issues here, this is a separate tract of land from that and I can see no purpose in asking this question, but I will let him answer it.

A. On a preliminary survey of the whole parcel I looked at the improvements but for the purposes of this appraisal I did not appraise them.

Q. Did you make any appraisal of them whether it was for this purpose or any other purpose?

A. No, I felt that they weren't in this.

Q. Now, you have included in your appraisal land on both sides of that fourteen acres, can you explain why you cut out the fourteen acres?

A. It was my feeling that through the unity of use rule the fourteen acres where the improvements are located had no bearing on the other land which are designated as dry grazing and not dependent upon each other.

Q. So that your appraisal of the land entirely ignored [23] the value of the improvements and other property except the dry grazing land?

(Testimony of Vernon C. Turner.)

A. I considered them. However, I did not appraise them by reason of the unity of use.

Q. You say you considered them, are they reflected in your valuation? A. They are not.

Q. You say you did make a preliminary appraisal of the property? A. Yes.

Q. What did that show as to value?

A. Well, the first duty of an appraiser is to look at the whole and in this case determine whether one is dependent upon the other. I looked at the properties, the improvements, yes, and I even know their dimensions but from an appraisal standpoint with the unity of use rule I disregarded them for the appraisal purpose of this action.

Q. In other words, your instructions were to disregard them, is that right?

A. I don't know whether my instructions were to disregard them or not.

Q. Well, let me ask you, Mr. Turner—you say you looked at the improvements and even know the dimensions of them, what they are made of and so on, would you [24] tell us what the fair market value is of the improvements on that fourteen acres you have referred to? I mean as of June 13, 1958?

Mr. Whittier: To which we object as being immaterial.

The Court: I think it is immaterial but I will let him answer.

A. I didn't make a bona fide appraisal of the improvements inside the fourteen acres.

Q. No, I realize that, but you have qualified your-

(Testimony of Vernon C. Turner.)

self here as an expert on real estate appraisals and I am asking you now, after viewing the property and knowing its size and so on, I am asking what is your opinion?

Mr. Whittier: I wish to interpose the objection that there is no proper foundation for this question. He stated that he didn't have sufficient information to make an appraisal.

Mr. Jeppesen: He has qualified as an expert appraiser and he said he is familiar with the improvements even knows their dimensions.

A. I did say that, but I also said that only in the preliminary survey did I look at the buildings to determine whether they should be or should not be included in the whole parcel and I determined that they should [25] not be included in the whole parcel so consequently I have no idea what they are worth.

Q. Do you have any opinion as an expert as to what their value is?

A. Since I didn't consider them, sir, my opinion would be valueless.

Q. Why did you, when you eliminated this fourteen acres, why did you do that, instead of two or three acres around the buildings?

A. I believe there is 12 point some odd acres, 12.67 acres which is under a contract for sale and when I say fourteen acres that's a round figure assuming that the difference between the fourteen and the 12.67 would be the adequate ground that the other improvements owned by Mr. Winn do set upon.

(Testimony of Vernon C. Turner.)

Q. Now, Mr. Turner, you say you have been appraising for five years and have been employed in all types of appraisal work. Taking into consideration the use to which all of the property of Mr. Winn's is put, that is, most of it to grazing but approximately fourteen acres as a rock shop and on a contract of sale for a service station. In your opinion is the fair market value of all of that property going to be affected by the construction of this highway? [26]

A. Not all of the property, because in making my appraisal as I have previously stated——

Q. I heard that but will you just answer my question?

The Court: He was answering your question.

A. As I previously stated only approximately 63 acres would be affected by the proposed improvement.

Q. All right, you say then that in your opinion the improved part of this property will not be affected by the making of this improvement?

Mr. Whittier: To which we object as being immaterial. He has stated that it was based upon the principle of unity of use, which is one of the elements considered in these particular suits.

Mr. Jeppesen: If your Honor please, I think that also is a question for the jury, what constitutes unity of use. Obviously he has singled out a piece of property, it is not cut off by any natural barrier, fence or road or anything else. He is singling out one little tract from this entire piece of property?

(Testimony of Vernon C. Turner.)

Mr. Whittier: If the Court please, I don't think this witness has testified to anything such as [27] that.

The Court: Knowing the situation here as I do, about all this testimony is good for is to confuse a person. These are two tracts of land and I will instruct the jury later and they will follow my instructions. I will let him answer if he can. I don't know how he can answer it if he didn't take that other into consideration.

A. Having not considered the other land, Mr. Jeppesen, I cannot give you an answer.

Q. Did you consider, Mr. Turner, in making your appraisal, did you consider the highest and best use of the entire tract belonging to Mr. Winn?

A. I previously said no.

Q. And if you were buying—I think you stated that the rule that you followed was what a willing buyer, not forced to buy would offer to pay, and what a willing seller, not forced to sell would ask for his property. Now, using that rule, Mr. Turner, would you be willing to give Mr. Winn, the defendant here just as much for his entire property out there after this highway is built as you would now, or if you knew that it wasn't going to be built?

Mr. Whittier: I want to interpose the objection that this is immaterial if this—— [28]

The Court: ——yes, it isn't a question of what he would be willing to do—he might not want any of the property under any conditions.

(Testimony of Vernon C. Turner.)

Mr. Jeppesen: Yes, I think that's true. I will withdraw the question.

Q. Mr. Turner, in your opinion, what is a fair market value of the entire tract, all of the property belonging to Mr. Winn, before this Road—or rather before the property was taken.

Mr. Whittier: We wish to object to that as immaterial as to that portion of the land not involved here.

Mr. Jeppesen: I will withdraw that question and ask another.

Q. What is your opinion as to the fair market value, Mr. Turner, or the difference in market value, let's put it that way, what is your opinion of the difference in market value of Mr. Winn's entire tract of property out there, after the taking of the property, and bearing in mind the use to which it is going to be put—the manner of the use?

Mr. Whittier: We wish to object to that as immaterial, that is, as to the portion of the land [29] not involved.

The Court: He has already said that he hasn't taken that into consideration at all. I think you are asking him the same question over and over, however, I will let him answer.

A. As previously stated, by the unit of use rule I didn't take it into consideration and frankly I have no idea.

Q. So actually your figures are based without taking into consideration the use to which part of

(Testimony of Vernon C. Turner.)

the property is put and the highest and best use to which it can be put?

A. As I previously stated I excluded fourteen acres and the highest and best use was on the balance of the land.

Q. Certainly, Mr. Turner, you wouldn't, as a real estate appraiser say that his property was worth only a hundred dollars less now that they are taking that property and excluding its access to the new road—you wouldn't say that it is worth only a hundred dollars less than it was before, would you?

A. By my previous testimony of the unit of use rule I said a hundred dollars?

Q. I am not asking that. I am asking what is your opinion as an appraiser right now?

A. Mr. Jeppesen, as a professional appraiser I can see it no other way. [30]

Q. I am merely asking you——

A. ——I don't have an opinion myself personally, for me to go out there to buy it, I wouldn't have any part of it.

Q. I am not asking what anyone told you to do, I am asking only—you qualified here as an expert and I am simply asking you, do you say that his entire tract is worth, after the taking, within a hundred dollars of what it was before?

Mr. Whittier: I wish to object, he has said time and time again that he doesn't have any opinion as to the entire tract.

The Court: Yes, he has said a hundred dollars,

(Testimony of Vernon C. Turner.)
but maybe he will change his mind, he may answer, go ahead.

A. Well, I am sorry, I don't know whether you want my so called professional opinion or my personal opinion or what you are looking for. I have given you all the answers that I have.

Q. I want your opinion as an appraiser now, let's forget who you are employed by——

The Court: ——Mr. Jeppesen, just ask your questions, don't argue with the witness.

Q. Mr. Turner, what I want to know is, what is your own opinion as an expert appraiser of real property, as to whether or not this entire tract is worth only a hundred dollars [31] less by reason of the taking and the exclusion of access than it was before the taking?

A. I previously stated, yes, one hundred dollars.

Q. You feel that, taking into consideration the loss of access to the property, that he can't get on that road without going clear to Mountain Home——

A. ——Mr. Jeppesen, by the rules by which an appraiser is governed there are certain things that you take into consideration and there are certain things that you do not take into consideration, until such time that I am instructed that circuitous travel is compensable I cannot consider it.

The Court: This is a very simple matter to clear up—not taking into consideration any highway construction there or anything of that nature, and taking the whole property, what would you say the value of the property was lessened by the taking of

this small tract of land, and you have already answered that as a hundred dollars. I don't see that there is anything more for him to answer.

Mr. Jeppesen: That's all.

The Court: We will take a recess for fifteen minutes.

(Admonition to the jury.)

3:19 P.M., September 24, 1958 [32]

COITE E. CLONINGER

called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Whittier:

Q. Your name is Coite Cloninger?

A. Yes, sir.

Q. You are a Deputy United States Marshal?

A. Yes, sir.

Q. You were told on this date, by the Court, to take the jury to certain lands belonging to Mr. and Mrs. Winn in an area just west of Mountain Home, is that right? A. That's right.

Q. Will you show on the map what area was shown to the jury, if you can?

A. First we went to the area known as the Crater Station, a service station there, and between the service station and the Rock House, we pointed out that property, and then we left there and came toward Boise a short distance maybe less than a quarter of a mile and turned off on an old road off

(Testimony of Coite E. Cloninger.)

through the sagebrush to where the property was marked off by means of flags and we pointed out to the jury these flags and this property involved. [33]

Q. You have heard the testimony given here, have you not? A. Yes.

Q. Did you determine that it was the same area that was referred to by the appraisers?

A. Yes.

Q. And that was shown to the jury?

A. Yes.

Mr. Whittier: That is all.

Mr. Clemons: No questions.

Mr. Whittier: The Plaintiff rests, your Honor.

Mr. Jeppesen: We would like to make a short statement to the jury at this time and then have a recess until morning if we may, we just got into the case and we would like to have a recess at this time.

The Court: That will be satisfactory to the Court.

Mr. Whittier: We have no objection to that.

(Opening statement by Mr. Jeppesen.)

The Court: We will recess at this time until 10 o'clock tomorrow morning. [34]

EMETT NEWEL

called as a witness by the Defendants, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Jeppesen:

Q. Will you state your name?

A. Emett Newell.

Q. Where do you reside?

A. 1107 Liberty Road, Boise.

Q. What is your profession Mr. Newell?

A. I am a real estate dealer and appraiser.

Q. Will you tell us how long you have been active as a real estate dealer and appraiser?

A. About four years.

Q. Prior to that time had you had any experience with real estate?

A. Well, I had owned and operated a ranch—quite a good sized ranch and I had bought and sold real estate, quite a considerable amount of real estate.

Q. Have you made any appraisals prior to the present one? A. Yes.

Q. For what Companies or individuals?

A. I appraised for the Prudential Insurance Company. I have [35] done quite a bit of appraising for different individuals for several different reasons, and of course, during my real estate business I appraise all the time for purchase and sale.

Q. Have you had any formal training for appraisal work?

(Testimony of Emett Newel.)

A. Yes, I went to the University of Oregon and took the Appraisal One course put on by the American Institute of Real Estate Appraisers, and I took an appraisal seminar put on by Jeff Holbrook and Ralph Alstrom of Portland.

Q. Was that at Boise Junior College?

A. At Boise Junior College, yes.

Q. Are you familiar with the property in question here, the property of Mr. and Mrs. Winn?

A. Yes, I am.

Q. Have you been on the property and made an examination of it, Mr. Newel?

A. Yes, I have.

Q. What is the highest and best use of the Winn property? A. As it is being used at present.

Q. And what is the present use?

A. Well, the present use is for the Commercial frontage there for the Rock Shop and the Highway frontage possibly for future development. [36]

Q. The frontage you refer to is that both sides of the highway? A. Yes.

Q. Do you have an opinion as to the market value of the Winn Property?

Mr. Whittier: May I ask a question in aid of an objection?

The Court: Yes, you may.

Q. (By Mr. Whittier): Now, is the opinion that you are about to give as to the land taken or as to the property as a whole?

A. I don't know what he is going to ask me yet.

Mr. Whittier: Nothing further at present.

(Testimony of Emett Newel.)

Q. The question Mr. Newel, is as to the market value of the Winn Property as it was just prior to June 13, 1958?

Mr. Whittier: I wish to object to that question on the ground that it covers issues far beyond the scope of this trial.

Mr. Jeppesen: If your Honor please, I think it is the well accepted rule that in condemnation cases, to fix severance value, it is proper to inquire as to the before and after value of the property. It is on that basis we ask this question.

The Court: So as to make this [37] clear to you I will say that the amount of damage that will be allowed will be the value of this tract of land that is being taken without regard to the fact that the freeway is being built. In other words, the Court cannot allow you any damages because the road is being built farther away from the defendant's property. The United States Law under which this freeway is being built provides that there is to be no gas stations or other places of business along the freeway where it is the duty to build an access road. In other words—this Court has viewed this property, with the consent of counsel, and the defendant will not be permitted to move his property—his buildings—which I understand he has sold—over to the highway. He couldn't move them over to the highway and have access from the highway to the buildings, and he couldn't require the Government to build an access road from the highway to his property. So the only thing I can submit to this jury is the value of this tract of land cut off from this place, what dam-

(Testimony of Emett Newel.)

age it does to the place, this small tract from the outside corner. I think I have made that clear.

Mr. Jeppesen: I would like to go on for the record on this basis.

The Court: I don't like to have [38] the jury confused and this evidence will not be any help to the jury in arriving at its verdict. However, if you want to put it in the record you may do so.

Mr. Jeppesen: Your Honor, I would like to have the record show by this witness, the value before and the value after.

The Court: I think the best practice would be for me to excuse the jury and in order that you may make up your record, you may, in the absence of the jury, state what you propose to prove.

(Jury excused and the following proceedings had without a jury.)

The Court: Now, go ahead, you know what the evidence is which you desire to have in the record and you may make a statement of what you propose to prove by this witness.

Mr. Jeppesen: Your Honor, we will offer to prove by this witness if permitted to testify—let me put it this way: This witness Mr. Emett Newel, if permitted, would testify that the defendant Winn had approximately 67 acres of land in one contiguous tract divided only by the present highway which runs through the property. There are no fences on either side of the highway except the fence around one building. That the [39] total value of the property as of the date immediately preceding the tak-

(Testimony of Emett Newel.)

ing on June 13, 1958, was the sum $11,380.00, and the witness will also testify that the land has a principal value as commercial property and a small use for grazing but that it has a potential on both sides of the highway as commercial property. That after the taking, the property as commercial property is valueless, that it has some value as grazing and also future farm land if something develops out there, which is speculative, so that the value after taking, of the entire tract is $2,400.00 and that the difference between the two values before and after is $8,980.00.

The Court: And it will be based upon the further reason that the gas station and the other business there doesn't have access to the highway.

Mr. Jeppesen: The gas station is not included in this your Honor.

The Court: I mean the other business does not have access to the highway.

Mr. Jeppesen: It is not cut off entirely your Honor. I think he can continue to Mountain Home by going on, continuing I think the witness testifies 4.10 miles or some such distance.

The Court: His opinion would be based [40] upon——

Mr. Jeppesen: ——it is a sort of cul de sac.

The Court: But his opinion would be based upon the fact that the new highway is to be constructed some distance from his place and that he didn't have access to the new highway?

Mr. Jeppesen: No proper access.

Mr. Clemons: It is also based upon his loss of the

(Testimony of Emett Newel.)
present access, and the element that he will take into consideration will be the loss of access.

The Court: It would have to be based on the highway that is proposed to be built—that it does not provide an access road to his place of business.

Mr. Clemons: That's true.

The Court: But there is no duty on the part of the Government to provide any access road for this property, you may make your record in conformity with the ruling.

(The following proceedings had in the presence of the jury:)

The Court: You may proceed Mr. Jeppesen, in conformity with the Court's ruling.

Q. Mr. Newell, do you have an opinion as to the market value of Mr. Winn's entire tract of land as of just prior to the taking on June 13, 1958?

A. Yes.

Q. And will you——

Mr. Whittier: ——Just a moment, please. We object to the question as being immaterial to the portion of the land lying south of the present highway.

The Court: I can see the reason for the objection, however, I will let him answer. What you are leading up to is contrary to the Court's ruling but I will let him answer.

A. I valued his entire holdings at $11,380.00.

Q. Now, Mr. Newel, taking into account that the taking of part of his property—strike that please,

(Testimony of Emett Newel.)

and let me ask this. Were you present yesterday when a witness for the plaintiff explained the map up there (indicating)—are you familiar with exactly what they are doing with the highway?

A. Yes.

Q. And you are familiar with the way it is being built with no access for some distance on each side of this property? A. Yes.

Q. Then I will ask you Mr. Newel, what is the fair market value of his property after the taking a part of it and devoting that part to the use proposed by the highway?

Mr. Whittier: We object to that as [42] being immaterial insofar as the use that the plaintiff is going to put the land to, and also insofar as it pertains to that land lying south of the present Highway 30.

The Court: Your question doesn't give the witness an opportunity to take into consideration the fact that this corner is being cut off for land for highway purposes and that there is no duty on the part of the Government to make an access road to this property, but with that added to it he may give his opinion as to what the value is before and after the taking of this particular tract of land. Do you understand the Court?

A. Yes. I value the land after the taking at $2,400.00.

Mr. Jeppesen: That is all, you may examine.

(Testimony of Emett Newel.)

Cross-Examination

By Mr. Whittier:

Q. Mr. Newel, in your valuation of the land, did you determine the value of the land taken on an acreage basis? A. Yes.

Q. And you were here when it was testified that they were taking 2.28 acres of the land?

A. I heard that, yes, sir.

Q. Now, what would be the value of the 2.28 acres of land [43] without any consideration given to any other particular item?

A. At the time I made my appraisal I didn't have the exact figure for that, and I figured it at approximately two acres and I valued that at $70.00.

Q. What was the value of the land taken, in your opinion, on an acreage basis?

A. $35.00 an acre.

Q. Then the total for the 2.28 acres would be somewhere in the neighborhood of $85.00 would you say? A. Approximately that.

Q. What did you base the other $7,900.00 on, what did you place that value on?

A. I appraised the buildings separately and the improvements on the property.

Q. What damage would this taking of the 2.28 acres do to the buildings?

A. To the buildings?

Q. Yes, what damage would the taking of that land do to the improvements?

A. Physically it would do none.

(Testimony of Emett Newel.)

Q. There would be no possible damage further—let me repeat that—there would be no possible further damage to the buildings by reason of this roadway not even [44] touching Mr. Winn's property than it would be by taking the 2.28 acres.

Mr. Jeppesen: Just a minute—we are not concerned with the physical damage to the buildings——

The Court: ——I don't need any argument on that, he may answer.

A. Will you state that again?

Q. If the Government had never touched Mr. Winn's property nor taken any of Mr. Winn's property but had gone to the north approximately three hundred feet so that the highway would have missed Mr. Winn's property entirely, would Mr. Winn's improvements be damaged just as much as they are under the present state of facts?

Mr. Jeppesen: We object to that as being incompetent, immaterial and irrelevant, asking for a conclusion of the witness and is speculative.

The Court: It appears to me to be a very plain question. He may answer.

A. Physically I would say the damage would be the same.

Q. What about other considerations that you have given?

A. Yes, the damage would be the same.

Q. Then your entire appraisal is based upon the access or non-access to the proposed new highway, is that correct?

(Testimony of Emett Newel.)

A. My appraisal in the damage done him was based on his loss [45] of access.

Q. It was based on the loss of access?

A. Yes, sir.

Q. Has Mr. Winn, at the present time, any access to any road leading in the present line of the proposed new highway?

A. I don't understand.

Q. Is there any road now existing in the proposed site of the new highway?

A. Not in the proposed site, just the present highway 30.

Q. He has no access to that portion of the land at the present time?

A. He has access to that portion of the land—he owns it.

Q. That portion, as far as the exterior boundaries are concerned he has no access to that. What access do you say that he has lost?

A. That he has lost?

Q. Yes, what access has he lost, you said that you base it upon loss of access?

A. I base it upon the fact that he has lost access, or that he has a business there and I based it on the fact that at the present time Highway 30 is well traveled and a lot of people stop in. That's how he makes his living out there. After the highway is moved I would say that he will have no business whatever because no one would drive out there to trade at his place of business [46] and drive eight or nine miles.

(Testimony of Emett Newel.)

Q. Then your opinion is based partially on loss of business is that right? A. Yes.

Mr. Whittier: We move that the opinion of this witness be stricken as being incompetent, irrelevant and immaterial and not being a proper basis upon which an award of damages can be made.

The Court: In view of the Court's ruling that there is no obligation on the part of the Government to build an access road from the new highway over to his place of business, even if it was built it would be doubtful that anybody would leave the main freeway to go over to his place of business. That is not a question here. There is no obligation on the part of the Government to build an access road from the new highway to his place of business or to permit him to move his buildings over to the new highway and give him an access to the new highway.

Mr. Jeppesen: It is not our contention that they should build him a new road or move his buildings, but it is our contention that if they destroy the access he now has, that they should pay for that. We don't contend that they should move his [47] buildings. There is no obligation to do that nor to build another road, but they should pay for what they are taking, and they are taking off the free access of the public and himself to his business.

The Court: The motion to strike will be granted, there is no proper foundation laid for it.

Mr. Whittier: No further cross-examination.

(Testimony of Emett Newel.)

Redirect Examination

By Mr. Jeppesen:

Q. Mr. Newel, let me ask, are you familiar with the construction, that is, the proposed detail of the new highway, as to where the defendant Winn and his customers will have to get off the new highway and drive to his place of business?

A. I saw the gentleman point it out on the map there.

Q. Your testimony here, you are basing that on the fact that he would have to—he and his customers would have to travel some 4.8 miles toward Mountain Home on a road which will no longer be maintained by the State, in order to get to and from his business?

Mr. Whittier: We object on the ground that there is nothing in the evidence upon which to base such a—— [48]

The Court: ——I will let him answer that.

Q. Are you taking that into account?

A. Yes.

Q. With reference to access from the other direction, are you familiar with the condition there?

A. I saw it pointed out on the map the other day.

Q. Then the basis for your appraisal was your knowledge of the property itself based upon an examination of it and also your knowledge of the condition that will exist upon construction of the new highway? A. Yes.

Mr. Jeppesen: We offer again, your Honor, his

(Testimony of Emett Newel.)

answer to the question of the market value of the property.

Mr. Whittier: To which we object as being immaterial.

The Court: The objection is sustained.

Q. Mr. Newel, one other question. In your opinion, is diminution in value after the construction of the highway, due to loss of access to his place of business? A. Yes.

Mr. Jeppesen: That is all.

Mr. Whittier: No further questions. [49]

Mr. Jeppesen: For the record we again offer Mr. Newel's testimony as to value, based upon the additional answers he has given now.

The Court: In view of the objection on the part of the Government the offer will be denied.

STEVE WINN

called as a witness by the defendants, after being first duly sworn testifies as follows:

Direct Examination

By Mr. Jeppesen:

Q. Will you state your name, please?

A. Steve Winn.

Q. And where do you reside Mr. Winn?

A. Eight miles out of Mountain Home, on Highway 30, at the Craters.

Q. Edith Winn is your wife, is she?

A. Yes, sir.

Q. Is she here today?

(Testimony of Steve Winn.)

A. No she is at home.

Q. How old are you Mr. Winn?

A. I am 64.

Q. You are the owner of the property that has been referred to on the map and in the testimony as the Winn property? A. Yes, sir. [50]

Q. How many acres does that consist of?

A. There is 67 acres.

Q. How long have you operated what has been referred to as the Rock Shop?

A. This is the fifth year.

Q. The fifth year? A. Yes, sir.

Q. Is that Rock Shop the means of your livelihood? A. I didn't get that.

Q. Is that Rock Shop the means of your livelihood? A. Yes, sir.

Q. Is that the way you make your living?

A. Yes.

Q. Now, you have heard all the testimony, yesterday, about the roads leading to and from your property? A. Yes, I did.

Q. I think there was something said about the road toward Boise that you could follow after they build the new highway. Will you tell us how you would get to Boise after this new highway is built on the line as shown on the map?

A. Well, there is two different roads he stated—the one that goes under an underpass is just a dirt road after it leaves the underpass and it wanders around plumb to the [51] mountains, back down to Mayfield and back down to the Crater station

(Testimony of Steve Winn.)

where it comes in. I would say it is approximately thirty-five miles.

Q. And it is just a dirt road?

A. It is just a dirt road and it is impassable in the wintertime.

Q. And that would be your only access if you went straight toward Boise?

A. Yes. The man, yesterday, showed another road on the map, on the other side but it's been abandoned for thirty years and it's impassable.

Q. Now, as a practical matter, to get to your place of business, people from the west, from Boise, would have to go past your place to Mountain Home, wouldn't they? A. That's right.

Q. And how far beyond your place would they get back on the old highway?

A. I think it's about four miles.

Q. Yesterday a witness testified that it was 4.8; would that be about right? A. I think so.

Q. And that would lead you to present highway thirty and over to your place? A. That's right.

Q. Now, in your opinion, Mr. Winn, what was the market value [52] of your property prior to June 13, 1958, when they filed this suit?

Mr. Whittier: Objected to as being immaterial as to the 67 acres, that part south of the present highway thirty.

Mr. Jeppesen: Your Honor, they themselves put in testimony yesterday as to the entire tract.

The Court: I will let him answer before he gives

(Testimony of Steve Winn.)

the difference in value. I will require you to conform to the Court's ruling.

A. What was the question?

Q. What is your opinion of the market value of your entire tract just prior to the taking on June 13, 1958?

A. Well, I have $15,900.00 in actual money in the place.

Q. Invested there? A. That's right.

Q. What would you say then is the market value of the property?

A. At the present time?

Q. No, just prior to the taking?

A. Well, I figure it is worth over twenty thousand, I never did want to sell it, or offer it for sale.

Q. Now, Mr. Winn, taking into account the taking of a small part of it and the manner in which they propose to build the highway through there, past your property, what would you say the property would be worth? [53]

Mr. Whittier: Objected to as being immaterial and no foundation is laid.

The Court: Objection sustained.

Q. Let me ask you, your valuation which you placed on it is based mainly upon your business property, is that right? A. Yes, sir.

Q. In your opinion would you be able to continue that business after the highway is built and your access is destroyed?

Mr. Whittier: That is objected to as being immaterial.

(Testimony of Steve Winn.)

The Court: Objection will be sustained.

Q. In giving your opinion are you taking into consideration or account your loss of access as we have been told here? A. No; I am not.

Q. Taking into account that your access to the new route will be destroyed, or rather disrupted as you have explained to us here, what would be your opinion of the value of your property after the taking of that part by the United States, the part indicated here (indicating)?

Mr. Whittier: Objected to as immaterial, no foundation is laid and it is far beyond the scope of this trial. [54]

The Court: The objection is sustained.

Mr. Jeppesen: I would like to make an offer of proof by this witness.

The Court: You may go ahead and make your offer, I won't excuse the jury, you may make the offer in the presence of the jury.

Mr. Jeppesen: If the Court please, at this time Defendants offer to prove by this witness, and if permitted to testify, he would testify that by reason of the disruption of access, on the east, to his property—let me change that—he would testify that by reason of the disruption of access from the east, to his property and by reason of the disruption of the access from the west to and from his property that his business would be rendered valueless except for the salvage value that he might get out of the buildings, and that the property thereafter would only be valuable for grazing rights,

(Testimony of Steve Winn.)

and that its value would be approximately $2,500.00 after the taking, and that value would be by reason of those elements.

The Court: The offer of proof will be denied, because it does not properly cover the situation.

Q. Mr. Winn, at the present time do you have any constructions of any kind on the south side of the highway?

A. On the south side of the old highway?

Q. Yes. [55] A. The present highway?

Q. Yes.

A. Yes; we have two signs over there.

Q. How much money do you have invested in those signs?

Mr. Whittier: To which we object as being incompetent, irrelevant and immaterial.

The Court: Yes; I think it is, but he may answer.

A. I think about a thousand dollars.

Mr. Jeppesen: That is all.

Cross-Examination

By Mr. Whittier:

Q. Does the Construction of the highway or the taking of the land touch any part of these signs that you spoke of? A. No.

Q. Does it damage them in any way?

A. Yes; they take my living away and leave me stranded on the desert.

(Testimony of Steve Winn.)

Q. I mean, does the taking of the land damage the signs in any way?

A. They don't damage the buildings, no.

Mr. Whittier: I move to strike the answer insofar as any damage to the signs as not being a proper item of damage to consider in this case.

The Court: It may be stricken. [56]

Mr. Whittier: That's all.

Mr. Jeppesen: That's all. The Defense rests.

The Court: Is there any rebuttal?

Mr. Whittier: Nothing further.

The Court: We will take a short recess and I will see counsel in chambers.

11:00 A.M., September 25, 1959

(Argument of counsel to Jury.)

INSTRUCTIONS OF THE COURT

Ladies and Gentlemen of the Jury:

We have now reached the point in this case where it becomes the duty of the Court to explain to you the issues in the case which you are called upon to determine by your verdict, and to instruct you as to the law and the rules by which you must be guided in your deliberations. It is your duty to accept these instructions as correct, and so far as the law in the case is concerned to be guided by the Court's instructions. The law provides an ample and adequate remedy whereby any mistakes in the

instructions may be corrected, but it is not the province of the jury to undertake to correct mistakes of law which the Court may make, and for the purposes of your deliberations the instructions which I will give you must be accepted as the law in the case. [57]

Yours is a serious duty, it involves a matter of great importance to those who are parties to this litigation. Your selection as jurors was not by chance, but was because of your reputation for good citizenry, intelligence and fairness.

You should see that these defendants receive, under these instructions which I am about to give you, fair compensation, no more, no less, for the taking of their premises. You and I are a part of the United States Government and each of us holds our place in this Government as an equal, and you, when you sit as jurors, are called to sit in judgment in this matter as a jury of the defendants' peers.

* * *

It is the duty of the Court to instruct you as to the law governing the case, and you shall take such instructions to be the law. You shall consider the instructions as a whole and not pick out any particular instruction and place any undue emphasis upon it.

You will disregard any statement made by counsel on either side which is not sustained by the evidence, and any evidence which may have been offered on either side and not admitted by the Court,

and any evidence which after the admission was stricken by the Court.

The statements of the attorneys in the case, [58] made at the beginning of the trial and in their arguments, are not evidence and should not be considered by you as such.

Your verdict must be based upon the evidence. In arriving at it you should not discuss or consider anything in connection with this case except the evidence received in this trial and your view of the premises.

It is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

* * *

You have a right to consider the interest of any witness or witnesses in the outcome of the case in giving credence to the testimony of such witness or witnesses. You will consider his opportunity of knowing or becoming acquainted with the situation surrounding the matters about which they testify, you may consider their frankness or lack of frankness and from all these things you will say what weight the evidence is entitled to receive.

* * *

The Government comes into Court just as a [59] private individual or a private corporation would

come if such individual or corporation were in need of the land here involved.

In other words, the Government comes here as a litigant or a petitioner, submitting itself to the jurisdiction of the Court, and asks the Court, and that includes the jury, to say what it should pay for the land involved here.

* * *

The fact that the relocation of the Interstate Highway may deprive the defendant here of profits incidental to his business is not an element of damages. The Government in the exercise of its lawful Governmental powers retains power to relocate highways within the State.

* * *

The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property, known in law as a right of access, and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

This instruction does not apply to the new highway, but just to the old highway. [60]

* * *

Testimony as to the market value has been given in this case by opinion witnesses, or expert wit-

nesses. The opinion of such witness is admitted in evidence in cases where the value of property, such as owned by the defendants in this case, and involved here, is in issue. An opinion witness is one who testifies that he has sufficient knowledge concerning the matter, acquired by study, training, and observation or experience, to permit him to give his opinion. Where the testimony of such witness is as to anything that can be observed and seen by any other witness, his testimony is to be viewed as that of any other witness, giving consideration to any particular training and experience he may have as to any bearing it may have upon any increased accuracy on his part over that of a person of ordinary experience. Insofar as his testimony is an expression of opinion based upon facts in the case shown by the evidence, you must, before considering the weight of the opinion of such witness, first find from the evidence that the facts upon which his opinion is based, are true. You are not bound by any opinion testimony, and it should be considered by you in connection with all the other evidence and should be given such weight as you believe it is entitled to receive.

* * *

Your view of the property was made with the thought in mind that you would be better able to follow the [61] testimony as given from the witness stand. You have a right to consider your view in arriving at a verdict in this matter, and you should

consider it together with all other evidence submitted.

* * *

It is necessary that the claim or claims of any party to a suit of this kind be proven by a preponderance of the evidence, and, of course, this is for you to decide in arriving at what you consider fair compensation in this matter.

* * *

By preponderance of evidence I do not necessarily mean the greater number of witnesses on a material point, but rather the weight of the evidence. That is, that evidence which when fairly, fully and impartially considered by the jury produces the stronger impression, and has the greater weight and is more convincing as to its truth or correctness when contrasted or weighed against the evidence in opposition thereto.

* * *

Under the Constitution of the United States it is provided that property will not be taken for public use except upon payment of just compensation. You will note that the thing the private owner is entitled to when [62] their property is taken for public use is "just compensation." The Government of the United States possesses what is known in law as the "power of eminent domain," which means that in the exercise of its legitimate powers it has the right to take private property whenever

such property is necessary for public use and convenience. In the exercise of that power the Government institutes an action which is commonly referred to as "condemnation proceedings" whereby it acquires title to the property of the individual upon condition that it pay just compensation to the owners of the property.

* * *

While the value is to be fixed as of June 13, 1958, that does not mean that you must necessarily exclude from your consideration all evidence relating to other dates. Our estimates of the value of property are very often influenced and materially affected by our knowledge of the history of the property and the conditions which, it is probable, will exist in the near future.

Generally speaking, you have a right, in fixing the value as of that date, to take into consideration all facts and circumstances in evidence which people who are buying and selling lands would take into consideration in private negotiations for the sale of such lands; both the [63] facts and circumstances which would tend to bear down the price, and the facts and circumstances which would tend to stimulate the price.

* * *

The necessity of the Government acquiring the property must not be taken into consideration, nor must any unwillingness to sell the property by the owners be taken into consideration in your deliberations. The owners of the property are entitled

to receive as compensation for the taking by the Government, the value of the property for the use for which it is most valuable, and by this is meant the market value for that use, not its value to the owner for such or any other particular use, but that price which a reasonably prudent and careful man, having knowledge as to valuations in the locality in question, and who is desirous but not under any necessity of purchasing, would be willing to pay for the property having such uses in view, or, if he were the owner thereof, would be willing to accept as the purchase price of it, he being under no necessity to sell. And while determining the fair, cash value of the property you will properly consider its capability and availability for the different uses to which it is reasonably and practically applied, you will, nevertheless, bear in mind that you are to ascertain and determine the full, fair, cash [64] market value of the property as it existed on June 13, 1958. In determining the fair cash market value of the property sought to be condemned you will not permit yourselves to be influenced by the character of the petitioner as the Government of the United States, and neither will you permit yourselves to be influenced in any way by the character of the defendants, or any unwillingness on their part to part with their property.

* * *

The act of Congress authorizing appropriations for the construction of the Interstate Defense System of Highways, of which the highway to be built

on the property sought to be condemned is a part, provides:

"All agreements between the Secretary of Commerce and the state highway department * * * shall contain a clause providing that the State will not add any points of access to, or exit from, the project in addition to those approved by the Secretary in the plans for such project, without the prior approval of the Secretary. Such agreements shall also contain a clause providing that the State will not permit automotive service stations or other commercial establishments for serving motor vehicle users to be constructed and located on the rights of way of the Interstate System." [65]

* * *

So many and varied are the circumstances to be taken into account in determining the value of property condemned for public use that it is impossible to formulate an exact rule to govern its appraisal in all cases. Exceptional circumstances will modify the most carefully guarded rule, but the general rule is that just compensation to the owner is to be determined by reference to the highest and best use for which the property is reasonably and practically suitable and adaptable, having regard to the existing business or wants of the community, or such as may reasonably be expected in the reasonably near future. The market value of land taken for public use includes its value for any use to which it may reasonably and practically be put, and all of the uses for which it is reasonably and practically adapted, and not merely the condition

in which it is found at the time of the taking, and to which it was applied by the owner at the time. Land, by reason of its location, surroundings, or natural advantages or inherent characteristics, may be peculiarly adapted to some particular use, and all of the circumstances which make up this adaptability are to be taken into consideration in determining the fair market value of the land and just compensation to the owner thereof. [66]

* * *

While the Court's statement of the law of the case must bind you and control you, any opinion or comment of the Judge as to the facts does not bind nor control you. Anything that I may have said or seemed to have said during these instructions or during the course of the trial with relation to the facts in this case, or any witness, is not to be considered as binding or controlling on you, for it is the jury that determines the facts and the weight of the evidence, and the credibility to be given to the different witnesses and to the testimony of the respective witnesses.

* * *

The instructions you have already heard have been expressed in what may be, for the layman, rather formal legal language. However, they are not intended to be mysterious. You are in the same position in arriving at your verdict as a Judge of this Court would be if a jury had been waived. Your verdict should be founded on your judgment, your memory and recollection, your experience, your common sense and your conscience.

You are not bound by the testimony of any wit-

ness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience. [67]

* * *

Your verdict is to be your best judgment under your solemn oath based on the evidence, and your view of the property, in the case. Of course, you should not diminish fair compensation even one single dollar because you find that the government has need for the property, or because of any favor you might have for the government's action. Likewise, neither should you enhance fair compensation even one single dollar because of any feeling that the government should not have taken the property, or because you believe it would have been better had the landowner been allowed to keep his property. Neither should you increase your verdict even one single dollar because you feel that the government has ample money with which to pay.

* * *

You have heard the witnesses and seen the exhibits offered in evidence. You have listened to the arguments of counsel and to the instructions of the Court, and soon you will retire to your jury room. You may take with you for such further examination as you may desire, the exhibits that have been admitted in the case, for consideration by you, and you will consider your verdict. [68]

You are instructed, however, that in arriving at any verdict, you are not permitted to add together different amounts representing the respective views

of different jurors and to divide the total by twelve or by some other figure intended to represent the number of jurors, or ideas represented. Any such would be a quotient verdict and would be contrary to law and contrary to your oath. You are, of course, to give serious consideration to each other's views and reasoning in an honest endeavor to reach common agreement upon the verdict, but such common agreement is to be based upon the final beliefs of each juror, and must not be arrived at by the mechanical device of addition and division which constitutes a quotient verdict.

* * *

The other jurors will be excused from the Court room for a moment while I take up a matter of law with counsel, and you will be called right back.

* * *

It will require the concurrence of the entire jury in order to return a verdict. When you retire to your jury room to deliberate, you will select one of your number as foreman who will sign your verdict for you when you have agreed upon one, and who will represent you as your spokesman in the further conduct of this case in Court.

* * *

There has been prepared for your convenience a form of verdict, and in the blank therein you should insert what you determine to be fair and just compensation for the landowner.

I will excuse you for a moment or two while I take up a matter of law with counsel.

The bailiffs may be sworn.

The alternate jurors, Mr. Bowen and Mr. George, may be excused until next Tuesday, September 30th, at 10:00 a.m.

* * *

(In the absence of the jury.)

The Court: Any exceptions to the instructions, Mr. District Attorney?

Mr. Whittier: The Government has an exception to the following instruction given: The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him the means of getting to and from his property known in law as a right of access and is a right which cannot be taken or materially interfered with by the State without payment of just compensation.

This instruction does not apply to the new highway, but just to the old Highway 30.

The Government will request an instruction and we believe the correct law to be: That discontinuance of a public street or its appropriation to other purposes than that of a highway does not constitute a taking of the property of the users, other than abutting owners, unless special damages are shown other than an inconvenience different in degree only from that suffered by the general public.

The Court: Let me have that. Now, Mr. Jeppesen, do you have any exceptions to the instructions given?

EXCEPTIONS TO THE INSTRUCTIONS

Mr. Jeppesen: Yes, your Honor, we take exception to the instruction which states: "The fact that the relocation of the Interstate Highway may deprive the defendants here of profits incidental to their business is not an element of damages. The Government in the exercise of its lawful Governmental powers retains power to relocate highways within the State." We object to the first sentence of that instruction and we feel that the correct instruction given by the Court on the right of abutting owners having a peculiar right not common to other citizens. In connection with that last instruction we feel that the last sentence where the Court said, "This instruction does not apply to the new highway, but just to the old highway," may be somewhat misleading to the jury and we object to that one sentence.

The Court: You may recall the jury.

(The following in the presence of the jury):

Mr. Jeppesen: I have some other objections, if the Court please.

The Court: Just a moment, you may take the jury out again.

(The following in the absence of the jury):

Mr. Jeppesen: We feel that the Court's instructions do not properly cover the following points, and we offer these instructions which we think should be given and they properly state the Defendants' theory of the case. First, instruction

number 1 offered by the defendant: "The measure of damages to be awarded to the defendants Steve Winn and Edith Winn in this case is the difference in market value of their property before the taking of any of it by the State as compared to its market value after the contemplated new highway is built."

We offer Defendants' instruction number 2 which we feel correctly states the law and should be given: "The owner of property abutting on a highway has a special and peculiar right in such highway not common to other citizens. That right is a property right appurtenant to his land and furnishes him a means of getting to and from his property, known in law as a right of access and is a right which cannot be taken or materially interfered with by the State without payment of just compensation."

The Court: I am sure I gave that instruction.

Mr. Jeppesen: That's right, your Honor, I failed to check it. Now, Defendants' requested instruction number 3: "You are instructed that all the loss or damage to the defendants occurring by the taking must be assessed or determined in one proceeding. The damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of the defendants' property and from the use to which the State proposes to put the property taken."

Defendants' requested instruction number 4 we feel states the law and should be given: "In determining market value of the Defendants' prop-

erty as of the date of the issuance of Summons in this case, and in determining market value of the property remaining after the taking, you must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the State has been taken and put to the use proposed by the Plaintiff, and you should determine the difference between the value before the taking and the value after the taking, and your judgment should be for the Defendant in the amount of that difference.

Last, the Defendants offer instruction number 5, we think it should be given as a proper statement of the law: "In determining the value of Defendants' property after the taking of a part of it by the State, you may consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have on the market value of the Defendants' remaining property."

The Court: The exceptions will all be denied. You may recall the jury.

Now, ladies and gentlemen of the jury, you may retire to consider your verdict.

State of Idaho,
County of Ada—ss.

I, G. C. Vaughn, hereby certify that I am the official Court Reporter who took the testimony and

proceedings given and had in and about the trial of the above-entitled cause, in shorthand, and thereafter transcribed the same into longhand (typing) and

I further certify that the foregoing transcript consisting of pages numbered to 75 is a true and correct transcript of the testimony given and the proceedings had in said matter.

In Witness Whereof, I have hereunto set my hand this 16th day of January, 1959.

/s/ G. C. VAUGHN,
Reporter.

[Endorsed]: Filed January 16, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint.
2. Request for Taking.
3. Declaration of Taking.
4. Motion for Order for Delivery of Possession.

5. Order for Delivery of Possession.
6. Judgment on Declaration of Taking.
7. Notice with Marshal's return thereon.
8. Demurrer of Steve Winn and Edith Winn.
9. Minutes of the Court of September 9, 1958.
10. Notice of Withdrawal of Attorney for Steve Winn, et al.
11. Motion of Orvill O. Mabe, et ux., to Intervene as Defendants.
12. Minutes of the Court of September 24, 1958.
13. Minutes of the Court of September 25, 1958.
14. Verdict.
15. Judgment on Tract No. 5 (Steve Winn and Edith Winn).
16. Stipulation and Petition for Entry of Judgment—Tract No. 10.
17. Judgment—Tract No. 10 (O. E. Cannon, et al.).
18. Notice of Appeal of Steve Winn, et ux.
19. Undertaking on Appeal.
20. Designation of Record on Appeal.
21. Order Extending Time for Docketing Record on Appeal.
22. Reporter's Transcript.
23. Exhibits Numbered 1, 2, 3 and 4.

In witness whereof I have hereunto set my hand and affixed the seal of this court, this 16th day of January, 1959.

[Seal] ED M. BRYAN,
Clerk,

By /s/ LONA MANSER,
Deputy.

[Endorsed]: No. 16340. United States Court of Appeals for the Ninth Circuit. Steve Winn and Edith Winn, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed: January 19, 1959.

Docketed: January 29, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
Ninth Circuit

No. 16340

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

29.27 ACRES OF LAND, More or Less in the County of Elmore, State of Idaho, STEVE WINN and EDITH WINN, Husband and Wife, et al.,

Defendants-Appellants

STATEMENT OF POINTS

The points upon which appellants will rely on appeal are:

1. The Court erred in advising and instructing the jury that the diminution in value of appellants' business property by reason of the destruction of business access to appellants' property could not be considered by the jury in fixing amounts of damage suffered by appellants.

2. The Court erred in advising and instructing the jury that appellants' damages must be limited to the market value of the land taken by appellee without regard to any diminution in value of appellants' remaining property by reason of the taking of a part of it by appellee.

3. The Court erred in advising the jury that because appellee is not obligated to build a new access way to appellants' property, appellee is not obligated to pay for appellants' access way taken or evidence of fair market value of appellants' destroyed by it.

4. The Court erred in excluding the appellants' property immediately before the taking and of the diminution in fair market value of said property by reason of the taking of it by appellee.

5. The Court erred in excluding appellant Steve Winn's testimony as to the effect on value of his business property by reason of the taking or destruction of access to said business property.

6. The Court erred in excluding evidence as to present use of appellants' property abutting on the North side of the present highway.

7. The Court erred in excluding evidence of the highest and the best use of appellants' property on both sides of the present highway.

8. The Court erred in instructing the jury that the rule that an abutting owner's right of access cannot be taken or materially interfered with in eminent domain proceedings without payment of just compensation does not apply to the new highway, for construction of which appellants' land and right of access was taken.

9. The Court erred in refusing to instruct the jury that the measure of damages to be awarded to the defendants Steve Winn and Edith Winn is the

difference in market value of their property before the taking of any of it by the appellee as compared to the market value of said property after the contemplated new highway is built.

10. The Court erred in refusing to instruct the jury that all the loss or damage to the appellants reasonably occurring by the taking must be assessed in one proceeding and that the damages to be assessed must cover all loss or damage which can reasonably be anticipated to result from the taking of a part of defendants' property and from the use to which the State proposes to put the property taken.

11. The Court erred in refusing to instruct the jury that in determining market value of the defendants' (appellants') property as of the date of the issuance of summons and in determining market value of the property remaining after the taking, the jury must take into account the uses to which the property may be most advantageously used prior to the taking as compared with the uses to which the property can be most advantageously applied after the part claimed by the plaintiff (appellee) has been taken and put to the use proposed by the plaintiff and that they should determine the difference between the value before and the value after the taking in determining the amount of their verdict.

12. The Court erred in refusing to instruct the jury that in determining the value of defendants'

(appellants') property after the taking of a part of it by plaintiff (appellee) the jury should consider the manner in which it is proposed to construct the new highway across his property and the effect that such proposed construction will have upon the market value of defendants' (appellants') remaining property.

CLEMONS, SKILES & GREEN,
JEPPESEN & JEPPESEN,

By /s/ CARL JEPPESEN,
Attorneys for Appellants.

Recepit of copy acknowledged.

[Endorsed]: Filed January 29, 1959.